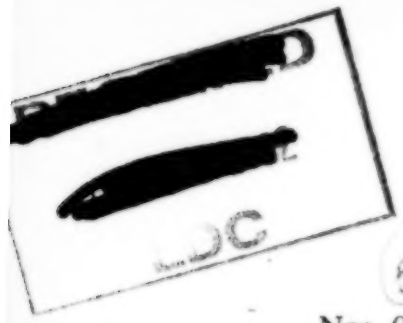

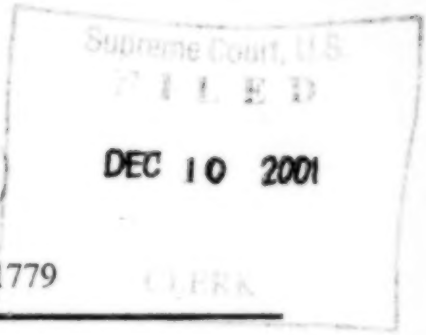

Nos. 00-1751, 00-1777 & 00-1779

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

SUSAN TAVE ZELMAN, SUPERINTENDENT OF OHIO, ET AL., *Petitioners,*

v.

DORIS SIMMONS-HARRIS, ET AL., *Respondents*

HANNA PERKINS SCHOOL, ET AL., *Petitioners,*

v.

DORIS SIMMONS-HARRIS, ET AL., *Respondents*

SENEL TAYLOR, ET AL., *Petitioners,*

v.

DORIS SIMMONS-HARRIS, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMICI CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION, ET AL., IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI*[1]

The *amici* are a broad group of associations and individuals dedicated to the improvement of public education in America. The *amici* also have a longstanding interest in implementing effective public school policies in accordance with constitutional requirements, including the Establishment Clause. Collectively, the *amici* represent hundred of thousands of parents, educators, and advocates for children concerned about the impact of vouchers on American education.

The National School Boards Association ("NSBA"), founded in 1940, is a not-for-profit federation of state associations of school boards across the United States, together with the school boards of the District of Columbia, Guam, and the U.S. Virgin Islands. NSBA represents the nation's 95,000 school board members, who govern the 14,722 local school districts that educate forty-seven million public school students. The school board associations in California, Florida, Maine, Michigan, Vermont and Washington represent all or most of the public school boards in their respective states. Each of these states has experienced either a voucher program, proposal, or case.

The National Parent Teachers Association, National Association of Secondary School Principals, American Association of University Women, American Association of School Administrators, National Association of Elementary School Principals, National Association of Federally Impacted Schools, National Association for Bilingual Education, Horace Mann League, the National Alliance of Black School Educators and the Public Education Network are all national associations committed to American education. Together, they represent citizens from every segment of American society who share a common concern for public education.

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[1] The Amici file this brief with the consent of all parties. No counsel for a party authored this brief in whole or in part. No person or entity, other than the Amici, their members or their counsel made a monetary contribution for the preparation or submission of this brief.

James J. Blanchard is the past Governor of the state of Michigan. Thomas D. Watkins, Jr., is the Michigan Department of Education Superintendent for Public Instruction. Kathleen N. Straus is the President of the State of Michigan Board of Education. Lawrence J. O'Neill is the President of the Board of Directors of Milwaukee Public Schools. Jennifer Morales and Peter Blewett are individual school board directors for Milwaukee Public Schools. All have personal experience with voucher programs or proposals and a commitment to quality education.

SUMMARY OF THE ARGUMENT

The Cleveland voucher program is inconsistent with the fundamental role of public education in American life. Since the development of widespread public education, the American people and our courts have always recognized that public education is a primary responsibility of the states and is essential to preparing children to be successful citizens in a pluralistic democracy.

Voucher programs are incompatible with these principles of public education. Vouchers purport to benefit the few, but at the expense of the many; they represent an abdication by the states of their responsibility to provide for all students and to make accountable use of taxpayer funds; and they withdraw children from the democratic, diverse environment of the public schools.

Nor do vouchers provide any benefits to counterbalance these costs. Vouchers, particularly the Cleveland program, fail to offer meaningful choice, fail to improve student achievement for participating students, and fail to improve public education for non-participating students.

The Cleveland voucher program also violates the Establishment Clause. The structure of the program overwhelmingly favors sectarian private schools, does not depend on independent, private choices, directly funds parochial instruction, and creates a financial incentive for religious education.

ARGUMENT

The debate over school vouchers is as much about the role of public education in America as it is about the Establishment Clause. As the Court has always recognized, the country's universal system of public education plays an essential role in our society by educating citizens for democracy, inculcating societal values, and socializing children for life in a pluralistic world. Voucher programs that divert public tax dollars to private schools undermine the ability of the public schools to fulfill these functions and are as objectionable for this reason as they are under the Establishment Clause for their direct state support of religious instruction.

I. The American Commitment to Public Education.

A. The People's Commitment to Public Education.

The "common" or public school emerged as the hallmark of American education in the nineteenth century. Horace Mann, who championed the public school as Massachusetts' first state superintendent, envisioned a system of schools that would be "common" to all people. Mann's conception took root. Supported by public funds, controlled by state authorities, and open to every child, the common school is the heart of American public education. *See generally* 1 James A. Rapp, *Education Law* § 1.01[3][c] (2001); Lawrence A. Cremin, *The American Common School: An Historic Conception* 219-20 (1951). *See also Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 214-217 (1948) (Frankfurter, J., dissenting) (discussing history of public education).

By the 1820s, most states had constitutional provisions addressing public education. By the 1850s, almost every state had a public education system in place. Compulsory education laws soon followed. By the start of the twentieth century a free public education was available to and, in most states, required for all. *See*

Rapp, *supra*, § 1.01[3][c]. Today, the American common school is part of the birthright of every American child.

America's common schools were developed to provide the education necessary for a healthy democracy. As the nation's founders recognized, education and effective self-government go hand in hand. In his Farewell Address, George Washington exhorted the country to "Promote, then, as an object of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of a government gives force to public opinion, it is essential that public opinion be enlightened." *George Washington: Writings* 972 (John Rhodehamel ed., 1997).

Thomas Jefferson, likewise, recognized the importance of public and publicly funded education: "I think by far the most important bill in our whole code is that for the diffusion of knowledge among the people. No other sure foundation can be devised for the preservation of freedom and happiness." 10 *The Papers of Thomas Jefferson* 244-45 (Julian P. Boyd, ed., 1954).

In addition to providing students with the intellectual tools necessary to a participatory democracy, public education also provides students with the social awareness necessary for a healthy society. The values inculcated through public education "include tolerance of divergent political and religious views...while tak[ing] into account consideration of the sensibilities of others." *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986). In the common school, children of all creeds, classes and backgrounds come together to share a common experience. Not only are children exposed to wide-ranging political and religious views, but they are taught tolerance and respect for those different from themselves. Through the common school, America's children learn the values of our diverse society.

Admittedly, not every public school accomplishes all of these purposes for every student. Nor does all public education today live up to the ideals of Jefferson and Mann. Serious problems confront many public schools. The *amici*, however, are committed to reforms that work, such as reduced class size, parent

involvement, professional development, and afterschool and preschool programs. Vouchers, which would inevitably harm the system of public education that has evolved over the past two centuries, are not such a reform.

The American public shares the commitment of the *amici* to public education and their concerns about vouchers. Forty-seven million students now attend public schools—roughly nine out of ten American children. *See* National Center for Education Statistics, *Projections of Education Statistics to 2011* <http://nces.ed.gov/pubs2001/proj01/chapter1.asp>.[2] Public education remains among the top concerns of the American people. One survey found that public education is the single most important issue in America today, above Social Security, health care and the economy. *See* Greenberg Quinlan Research and the Tarrance Group, *Education Top Priority Nationally and In States* (poll conducted February 4-7, 2001); *see also* The Gallup Organization, *Education Reform: The Public's Opinion* (January 24, 2001) <http://gallup.com/poll/releases/pr010124b.asp>.

This same public has rejected vouchers. Opinion polls indicate that the public disapproves of vouchers by a 15 to 28 percent margin. *See* Phi Delta Kappa/The Gallup Organization, *The 33rd Annual Phi Delta Kappa/Gallup Poll of the Public's Attitudes Toward the Public Schools* (September 2001); ABC News.com, *No Big Issue: Public Isn't Clamoring for School Vouchers* (October 17, 2000) <http://abcnews.go.com/sections/politics/DailyNews/schoolvoucherspoll001017.html>. In the last decade, the Senate, House, and legislatures in at least 37 states have rejected voucher programs. *See* Nina Shokraii Rees, *School Choice 2000: What's Happening in the States* (2000); 145 Cong. Rec. S9896 (daily ed. July 30, 1999) (recording Senate vote rejecting national voucher program by margin of eighty-seven to thirteen); Juliet Eilperin, *House Advances Education Overhaul*, Washington Post, May 24, 2001, at A1.

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[2] All Internet sources cited herein were visited on December 5, 2001, and citations were valid as of that date.

The public has also rejected vouchers at the ballot box. Voters in California and Michigan overwhelmingly defeated voucher initiatives in November, 2000. Seventy-one percent of voters in California rejected a plan for statewide vouchers, and sixty-nine percent of voters in Michigan rejected a limited proposal to give vouchers to students in seven school districts. In both states, the voting was consistent across demographic groups: Democrats, Republicans, Independents, Catholics, Protestants, Whites, Hispanics and African-Americans all voted against the plans. So did voters in Detroit, where the Michigan program would have begun. *See* Associated Press, *No Voter Support for Vouchers*, Milwaukee Journal Sentinel Online, November 9, 2000; CNN.com, *Exit Polls for California* (Nov. 7, 2000) <http://www.cnn.com/ELECTION/2000/epolls>; Michigan Department of State, *Michigan Election Results 2000* (last updated Jan. 9, 2000) <http://www.sos.state.mi.us/election/results/00gen/>; *The Voucher Vote*, The Palm Beach Post, November 13, 2000, at 22A.

Prior elections have produced similar results. Voucher proposals were rejected in 1996 by sixty-five percent of voters in Washington state; in 1993 by seventy percent of voters in California; in 1992 by sixty-seven percent of voters in Colorado; in 1978 by seventy-four percent of voters in Michigan; and in 1972 by fifty-five percent of voters in Maryland. *See* Michael A. Resnick, *Why Vouchers Won't Work* 47 (1998). In fact, voters have never approved a single voucher program anywhere.

B. The Courts' Commitment to Public Education.

Like the American people, this Court has always recognized the critical role that public education plays in American society. The Court's commitment to public education as expressed in *Brown v. Board* has resonated through the last fifty years of education law:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the

> importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Brown v. Board of Educ., 347 U.S. 483, 493 (1954). The Court's emphasis in *Brown* was not on education in general, regardless of source, but on education as a *function of state and local government*, *i.e.* as a public responsibility serving the public good.

The Court has echoed the same themes throughout its education law jurisprudence. Thus, the Court has concluded that "public school teachers may be regarded as performing a task 'that [goes] to the heart of representative government'" and that public schools "are an 'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground." *Ambach v. Norwick*, 441 U.S. 68, 75-76 (1979) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 n.6 (1973)). *See also, e.g., Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986) ("[Public] education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.") (internal citations omitted)); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("In sum, education has a fundamental role in maintaining the fabric of our society."); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) ("Nothing this Court holds today in any way detracts from our historic dedication to public education.").

Thus, this Court's decisions consistently recognize that education is a public function necessary to preserve a democratic society. The states, too, have recognized the crucial role played by public education. Today, every state constitution contains an education clause that recognizes the provision of a public education

as a state function. *See, e.g.*, William Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 Educ. L. Rep. (West) 19 (1993); Molly McCusic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 Harv. J. Legis. 307 (1991).

Appellate courts in the majority of the states have now confirmed the states' constitutional obligations to provide an adequate public education on an equal basis to all children. *See, e.g.*, Douglas S. Reed, *On Equal Terms: The Constitutional Politics of Educational Opportunity* (2001) (addressing the current status of education finance litigation). Time and again the courts have insisted that the states provide for the needs of students in *all* of the public schools and eliminate disparities in educational opportunity. *See, e.g., Horton v. Meskill*, 376 A.2d 359 (Conn. 1977) (holding that state must "provide a substantially equal educational opportunity to its youth in its free public elementary and secondary schools"); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1376 (N.H. 1993) (finding that constitution "imposes a duty on the State to provide a constitutionally adequate education to every educable child and to guarantee adequate funding"); *Leandro v. State*, 488 S.E.2d 249, 257 (N.C. 1997) (declaring that constitution "requires that all children have the opportunity for a sound basic education"); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 91 (Wash. 1978) (concluding that "the constitution has created a 'duty' that is supreme, preeminent or dominant" to provide an adequate education with "sufficient funds").[3]

II. Vouchers Conflict with the Values of American Public Education.

Every facet of American society has recognized the crucial role that public education plays in furthering our common values and democratic processes. The importance of public education is

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[3] This is only a small sampling of state decisions affirming the duty of the states to provide for public education. The Advocacy Center for Children's Educational Success With Standards maintains a current and historical database of all state education litigation at http://www.accessednetwork.org/litigationmain.html.

embedded in our history, the holdings of this Court, state courts, and the public consciousness. Voucher programs such as the Cleveland program at issue here, however, undermine the essential attributes of American public education and run counter to its entire history.

A. Vouchers Conflict with the Obligations of the States to Support Public Education.

The essence of the American public school system is a publicly funded, publicly accountable education that is open to all. In recent years, state courts have confirmed, time and again, that the states cannot evade their responsibility to provide equal and adequate schools for all students. *See supra*, part I.B. Voucher programs, particularly programs like the Cleveland plan that apply to only a handful of students, ignore the obligations of the states to *all* students.

The Cleveland School District enrolls about 76,000 students. *See* United States General Accounting Office, *School Vouchers: Publicly Funded Programs in Cleveland and Milwaukee* 5 (Aug. 2001) [hereinafter "GAO Report"]. In the 2001-2002 school year, 4,266 Cleveland students received vouchers, or less than six percent of the student population. *See* People for the American Way, *Five Years and Counting: A Closer Look at the Cleveland Voucher Program* 2 (September 25, 2001). Funding for the Cleveland voucher program comes from Ohio's Disadvantaged Pupil Impact Aid ("DPIA") program. DPIA monies are normally intended to help disadvantaged public school students by funding pre-schools, all-day kindergartens, smaller class sizes, and reading improvement programs. *See* Ohio Rev. Code Ann. § 3317.029 (West Supp. 2001).

To date, the Cleveland voucher program has had a direct cost of more than $28 million, and a total cost of more than $33 million when administrative expenses are included. *See Five Years and Counting*, *supra*, at 1-2. This year, the program is expected to drain more than $8 million from Cleveland's public schools in DPIA funds, plus another $2 million in transportation costs. *See id.*

at 2. When all program expenses are taken into account, including state administration expenses and the state's already substantial aid to private schools, at least one analysis has concluded that Ohio spends more tax money per voucher student than it does for nearly 90 percent of the state's public school children. *See* Doug Oplinger and Dennis J. Willard, *Vouchers Costing Ohio,* Akron Beacon Journal, March 27, 1999; *Five Years and Counting*, *supra*, at 2.

All of this money *could* be going to the Cleveland public schools to improve education for the 94% of its students *not* served by vouchers. Instead of fulfilling its obligation to provide a sound public education for all students, however, Ohio has abandoned this responsibility in favor of an expensive program designed for only a chosen few.

Nor have the Cleveland schools recognized any cost savings from the withdrawal of voucher students. A 1999 study by consulting firm KPMG found that the Cleveland School District's operating costs have continued to increase despite the withdrawal of voucher students because voucher students are drawn from throughout the large district. Consequently, the Cleveland public schools are "losing [state aid] without a change in their overall operating costs." *See* KPMG LLP, *Cleveland Scholarship and Tutoring Program: Final Management Study* 9-5 (September 9, 1999).

Results from Wisconsin's Milwaukee voucher program are similar. The Milwaukee program—the nation's largest voucher program—enrolled just under 10,000 students last year, or about 10% of the students in Milwaukee Public Schools. The Milwaukee program cost $49 million in state aid, half of which was diverted from Milwaukee Public Schools and half of which was diverted from all other Wisconsin public school districts. As a result, in an unsuccessful attempt to benefit 10% of the Milwaukee student population, 238 other public school districts in Wisconsin lost funds, prompting property tax increases. *See* Wisconsin Legislative Fiscal Bureau, *Funding for the Milwaukee Parental Choice Program* 5 (May 8, 2001); The Heritage Foundation, *School Choice 2001: What's Happening in the States* 248 (2001). Meanwhile,

Milwaukee Public Schools has had to cut programs in the face of budget shortfalls of up to $32 million. *See* Sam Schulhofer-Wohl, *Protesters Slash at MPS Budget Plans,* Milwaukee Journal Sentinel, March 28, 2001, at 1B; Robert C. Johnson, *Union-Backed Candidates Win Milwaukee Board Seats,* Education Week, April 11, 2001, at 3.

American public education should serve to prepare all children for active participation in our society. That goal cannot be achieved through programs that drain resources from the public schools serving more than ninety percent of children in a misguided attempt to benefit a select few.

B. Vouchers Conflict with State Obligations to Meet the Educational Needs of All Students.

In addition to withdrawing resources from public education, voucher programs do not benefit the students most in need of help. In a society that strives for equality, education means maximizing opportunity for each child, regardless of educational need. Yet students with physical, mental and emotional challenges and limited English proficiency are the least likely to be served in voucher programs. *See, e.g.,* Scott S. Greenberger, *Voucher Lessons Learned,* The Boston Globe, February 26, 2001, at A1; Julie Mead, *Publicly Funded School Choice Options in Milwaukee,* Public Policy Forum, June 2000.

The evidence of exclusion comes from voucher advocates, parents of former voucher students, and participating private schools. As David Brennan, the one-time leader of the voucher push in Ohio, explained to the governor: "Numerous scholarship [voucher] recipients were discouraged from taking their scholarships to private schools with the full knowledge that none of the existing private schools will be able to handle a seriously handicapped child." Memorandum from Brennan to Tom Needles, Ohio Governor's Office (Sept. 27, 1996) <http://www.ohio.com/bj/projects/whose_choice/pages/96_0927_3Brennanp3.JPEG>. A state education official confirmed such exclusionary practices, noting that special education students "were actively counseled out

of the program." Dennis J. Willard and Doug Oplinger, *Voucher Plan Leaves Long List of Broken Vows*, Akron Beacon Journal, Dec. 14, 1999 <http://www.ohio.com/bj/projects/whose_choice/docs/029046.htm>.

Likewise, many parents whose children have withdrawn from the Cleveland voucher program have informed state officials through exit interviews of the shortcomings inherent in the program. Several have noted that the program "does not provide for special needs students." Wrote one: "My son receives half day regular classes, half day special classes, and I couldn't find a school that would take him in...." Office of Cleveland Scholarship and Tutoring Program, *Collected Exit Interviews* (2000-2001). For these parents and children, the "choice" promised by their vouchers rings hollow.

The Milwaukee program contains similar deficiencies. Numerous voucher schools in Milwaukee have acknowledged their inability to serve special needs students. For example, the Mount Calvary Lutheran School candidly indicates it "is unable to serve students who are unable to climb stairs, have severe emotional problems, are mentally disabled, or have other severe learning problems." Empowering Parents for Informed Choices in Education, *Mt. Calvary Lutheran School* <http://epic.cuir.uwm.edu/EPIC/English/data/mtcalv.html>; *see also* Empowering Parents for Informed Choices in Education, *St. Bernadette School* <http://epic.cuir.uwm.edu/EPIC/English/data/stbern.html> (unable to serve educationally or emotionally disabled students or those more than one year below grade level); Empowering Parents for Informed Choices in Education, *Our Lady Queen of Peace*, <http://epic.cuir.uwm.edu/EPIC/English/data/queeno.html> (unable to serve emotionally or educationally disabled students and lacking access for the physically disabled).

Private voucher schools can maintain these positions because they are exempt from most anti-discrimination laws. The Americans with Disabilities Act does not apply to private schools with religious affiliations. *See* 42 U.S.C. § 12113. Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination

against the handicapped in education, applies only to programs that accept federal funds. *See* 19 U.S.C. § 794. The Individuals with Disabilities Education Act imposes the principal burden for assuring an adequate education to students with disabilities on a child's local *public* school district, not on private schools. *See* 20 U.S.C. § 1414.

Nor are these problems limited to Cleveland and Milwaukee. A 1998 survey by the United States Department of Education of private schools in the inner cities of large metropolitan areas found that sixty-eight percent of the schools would "definitely or probably" *not* be willing to participate in a voucher program if they had to accept "special needs" students, such as those who are limited English proficient, learning disabled, or low achieving. *See* Lana Muraskin, *Barriers, Benefits, and Costs of Using Private Schools to Alleviate Overcrowding in Public Schools* 49-51 (1998).

Finally, one of the few points on which all educational researchers agree is that student achievement is directly and highly correlated with parental involvement. *See, e.g.*, Laura Desminone, *Linking Parental Involvement with Student Achievement: Do Race and Income Matter?*, J. Educ. Res., Sept./Oct. 1999 at 11; *Parental Involvement Supports Academic Improvement Among Middle Schoolers*, Middle Sch. J., May 2001 at 56.

The children of involved parents are far more likely to participate in voucher programs. A parent must take the initiative to apply for the program, select a private school, and follow through. Not surprisingly, Wisconsin's official evaluator found that parents of voucher students were considerably more involved in their children's education than public school parents. *See* John F. Witte, *The Milwaukee Voucher Experiment: The Good, the Bad, and the Ugly*, Phi Delta Kappan, Sept. 1999, at 61.

On the other hand, few if any children of uninvolved parents, *i.e.* those children most at risk of failure, are likely to participate in the program. Thus, the very nature of voucher programs, and particularly the Cleveland program, largely precludes participation by those students most in need of assistance.

Instead, they will be relegated to the increasingly resource-deprived public school systems that legislators have chosen to ignore in favor of voucher programs that apply only to the well-behaved, non-disabled children of actively involved parents.

C. Vouchers Conflict with the Accountable Use of Taxpayer Funds.

Governments have an obligation to make responsible use of taxpayer funds. Because public schools are entrusted with fundamental responsibilities, states must use particular care to ensure that funds appropriated for public education further the public interest. Yet voucher programs contain virtually no protections for taxpayers.

Voucher schools need not comply with open meeting and records laws, adhere to state academic standards, or report on academic achievements. Nor are they subject to state accountability measures to address educational deficiencies. In Ohio, the state's Superintendent of Public Instruction is authorized to exempt participating voucher schools from even the few educational requirements that do exist. *See* Ohio Rev. Code Ann. § 3313.976(A)(3) (West Supp. 2001); Scott Stephens and Mark Vosburgh, *Murderer on Staff of State-Funded Private School,* The Plain Dealer, July 1, 1999, at 1A.

Nor are voucher schools subject to Ohio's "performance accountability" system, which grades the academic performance of school districts and establishes escalating state interventions designed to raise educational results to acceptable levels. *See* Ohio Rev. Code Ann. § 3302.01 *et seq.* (West Supp. 2001). Voucher schools are likewise exempt from Ohio's proficiency testing requirements, including minimum standards set for the award of high school diplomas. *See id.* § 3313.976(A)(3) (requiring voucher schools to satisfy only those state educational standards in place as of July 1992); *Ohio Ass'n of Indep. Sch. v. Goff*, 92 F.3d 416, 421 (6th Cir. 1996) (explaining that, prior to 1993, state educational standards did not require private schools to comply with state proficiency testing requirements).

Moreover, Ohio prepares annual publicly available reports on all aspects of each public school district's operations – from test scores, to school safety and discipline, to teacher qualifications and library resources. *See id.* § 3302.03 (West Supp. 2001). Schools participating in the voucher program, however, must provide only the most minimal information, namely "the grade levels offered, the numbers of students, tuition amounts, achievement test results, and any sectarian or other organizational affiliations." *Id.* § 3313.978(D)(2) (West Supp. 2001).[4]

Similarly, voucher schools in Milwaukee and Florida are largely free from state oversight and public scrutiny. *See* Julie Mead, *Publicly Funded School Choice Options in Milwaukee*, Public Policy Forum, June 2000, at 11; John F. Witte, *The Market Approach to Education: An Analysis of America's First Voucher Program* 46 (2000); Associated Press, *State Refuses to Release School Voucher Test Scores* (June 8, 2000); *Program Needs Oversight*, Sun-Sentinel, October 23, 2001, at 18A; *McKay's 'Bad Apple'?*, St. Petersburg Times, October 29, 2001, at 10A.[5]

Despite this nearly complete lack of oversight, voucher programs funnel millions of dollars in taxpayer funds to private institutions with no assurance that the state or its citizens will get any return on their investment. In contrast, states regulate every

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[4] Although a state statute provides for annual reports by parochial and private schools, *see* § 3301.14, no such reports are currently required by the state.

[5] As a consequence of this lack of oversight, evidence of public waste abounds. In Ohio, the state was forced to conduct its own audit of the voucher program after accounting giant DeLoitte & Touche was unable to complete an audit due to lax record-keeping. The state's audit showed, among other things, that the state had paid out $3.5 million to transport voucher students by taxicab, a sum that included more than $419,000 in overpayments to cab companies; paid one voucher school more than $70,000 for students who were not even enrolled; and paid more than $150,000 to a "video school" that had no immunization requirements or emergency procedures and in which students watched video-taped lessons in an unsafe building with no fire safety or health certificates. *See* Jim Petro, *Cleveland Scholarship and Tutoring Program Special Audit Report*, (Jan. 5, 1999); *see also* Jeff Archer, *More Oversight Sought for Ohio School Choice*, Education Week, January 19, 2000, at 5; Scott Stephens and Mark Vosburgh, *Voucher School Relies on Videos as Teachers*, The Plain Dealer, July 10, 1999, at 1A.

aspect of traditional public schools, from curriculum to procurement to assessment, to assure the responsible use of public money and the adequate education of the young. Voucher programs abandon these safeguards and, in so doing, abandon any sincere effort to assure that the publicly funded education provided by voucher schools actually meets public needs.

D. Vouchers Conflict with Education for a Democratic, Pluralistic Society.

Among the many shared values taught in public schools is an appreciation of the importance of each individual's civil rights. Public schools do not just teach about these rights; they expose students to their application on a personal level. Public schools are subject to all of the restrictions and restraints placed on the state through federal and state constitutions, statutes, and regulations. Because public schools extend these protections to students, the students learn to exercise, respect, and value them responsibly.

This Court has declared that children should not be forced to "shed their constitutional rights . . . at the schoolhouse gate." *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969). In public schools, students have the right to free exercise of religion, freedom of expression, freedom of association, freedom against unreasonable search and seizure, equal protection under the law, and due process. *See West Virginia v. Barnette*, 319 US. 624 (1943) (religion); *Tinker*, 393 U.S. 503 (speech); *Healy v. James*, 408 U.S. 169 (1972) (association); *New Jersey v. T.L.O.*, 469 U.S. 325 (1984) (search and seizure); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (equal protection); *Goss v. Lopez*, 419 U.S. 565 (1975) (due process.) Thus, these liberties are a guaranteed part of the public school experience. Yet none of these freedoms apply inside private voucher schools. *See, e.g., Logiodice v. Trustees of Me. Cent. Inst.*, No. 00-CV-246-B-S, 2001 U.S. Dist. LEXIS 18269 (Nov. 8, 2001) (holding that private high school that contracted to educate publicly funded students was not a state actor and not subject to the due process clause).

Just to teach about the responsible exercise and protection of constitutional rights is not enough. Students need the opportunity to participate in the application of those rights in institutions that offer democratic opportunities. Certainly, according constitutional rights to students may sometimes be inconvenient or uncomfortable. The benefit, however, is that students have an opportunity to learn to exercise these constitutional rights responsibly and to appreciate and respect democratic institutions. *See, e.g., Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.")

Voucher programs, in contrast, take the curious position that the best way to further the values behind public education is to send students to institutions where they enjoy none of the rights associated with those values. Voucher programs divert public funds to enroll children in private schools where they can be disciplined or even expelled without due process for exercising such fundamental rights as freedom of speech. This approach is incompatible with the mission of public schools to infuse students with an understanding of democratic values.

While not every school succeeds, public schools continue to have the capacity to provide a hands-on understanding of what it means to live in a pluralistic society. Public schools were created as places where a diverse nation of immigrants could come together to learn how to be citizens in a democracy. During earlier waves of immigration, the public school was the institution responsible for building a common culture—it was the "melting pot." More recently, public schools have helped to promote progress in civil rights by bringing together children of different races during their formative years, before prejudices have taken hold.

Voucher options, however, permit families to select for insular and homogenous educational environments. This is not an idle concern. The latest study of the Cleveland program concludes that it has the potential to significantly contribute to racially isolated education. *See* Kim Metcalf, *Cleveland Scholarship*

Program Evaluation, 1998-2000 (Sept. 2001).[6] Metcalf found that voucher participants are disproportionately White compared to their public school peers and the gap widens as the students become older. For example, in the spring of 2000, while Whites represented just fourteen percent of Cleveland public school students who did not apply for vouchers, they represented thirty-two percent of the voucher recipients. In contrast, African-Americans constituted seventy-four percent of the public school students who did not apply for vouchers, but just fifty-five percent of actual voucher students. *See id.*, Technical Report at 29, Summary Report at 4.

The GAO Report points to a similar development in Milwaukee, where more than ninety-six percent of voucher students were from a minority group in the 1994-95 school year, but just seventy-nine percent of voucher students were minorities by 1998-99, after religious schools were included in the program. *See* GAO Report at 19. The GAO Report also questions the validity of three earlier studies in Cleveland and Milwaukee that claimed the voucher programs promoted integration. *See* GAO Report at 21-22. Recognizing these developments, Dr. John Witte, official state evaluator of the Milwaukee program, has written: "Thus a program originally intended to aid poor, minority families in Milwaukee's inner city seems to be subsidizing what we may infer to be primarily white families." John F. Witte, *The Market Approach to Education: An Analysis of America's First Voucher Program* 188-89 (2000). The Cleveland and Milwaukee data therefore suggest that voucher programs contribute to the resegregation of schools. Again, this is antithetical to the mission of public schools and an inappropriate use of public monies.

III. The Alleged Benefits of Voucher Programs are Illusory.

Voucher proponents ignore the conflicts between voucher programs and the values underlying American public education and

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[6] The State of Ohio commissioned a multi-year evaluation of the Cleveland program by researchers at Indiana University. The team, led by Dr. Kim Metcalf, recently released the latest installment in the multi-year study.

instead claim that vouchers are justified by their supposed benefits for students and their enhancement of public schools through "competition." The facts, however, do not support the claimed benefits.

A. Vouchers Do Not Offer Meaningful Choice.

Much of the rhetoric of vouchers revolves around a mantra of "choice" as the panacea for all that ails American public education. Vouchers are held out as a tool for granting freedom to families that would otherwise be "stuck" in dysfunctional public school systems. Leaving aside for the moment that the real solution ought to be to fix those systems rather than flee from them, the Cleveland program demonstrates that the "choices" offered by vouchers are largely illusory.

As discussed above, vouchers offer little or no choice to many of the students most in need of educational assistance. Students with disabilities—physical, mental or behavioral—are largely unwelcome in the voucher schools. *See supra*, part II.B.

In addition, vouchers provide little real choice of non-religious alternative schools and inherently favor religious schools. Ninety-six percent of Cleveland voucher students attend religiously-affiliated private schools, and eighty-two percent of participating schools are sectarian. Other private schools do not participate because they cannot limit their tuition to $2,500 without the financial support provided through affiliation with a church. That is not surprising, because actual educational costs greatly exceed voucher values. The statewide costs of educating public students in Ohio in fiscal year 2000 was $7,057 per pupil—more than three times the maximum voucher value—and the Cleveland City School District spent $7,833 per student. Ohio Department of Education, *2001 Ohio Department of Education Local Report Card* <http://www.ode.state.oh.us/reportcard>.

Nationally, tuition at nonsectarian private schools averages $6,822 per student. *See* National Center for Education Statistics, *Private Schools in the United States, 1993-1994*, at Table 1.5 (June

1997) <http://www.nces.ed.gov/pubsearch/pubsinfo.asp?pubid=97459>. Public school expenditures average $6,508 per student. *See* National Center for Education Statistics, *Statistics in Brief: Revenues and Expenditures for Public Elementary and Secondary Education: School Year 1998-99*, at Table 5 (March 2001) <http://www.nces.ed.gov/pubsearch/pubsinfo.asp?pubid=200011321>. Both far exceed the Cleveland voucher value and the average tuition at religious schools. Nationwide, tuition at Catholic schools averages $1,934, and tuition at other parochial schools averages $2,293. *See Private Schools in the United States*, *supra*, at Table 1.5. These cost disparities explain why school "choice" through vouchers is predominantly restricted to religious schools. Participants have a clear incentive to choose religious schools for the simple reason that few other schools accept vouchers.

In Cleveland, the same economic factors prevent suburban school districts from accepting voucher students from the Cleveland public schools. The surrounding suburban school districts spend an average of more than $9000 per student, and receive an average of just over $2500 per student from the state. Adding the $2500 voucher amount to the $2500 in state funding would still leave an average shortfall of $4000 per student for the suburban districts if they chose to participate in the voucher programs. *See* Ohio Department of Education, *2001 Ohio Department of Education Local Report Card* <http://www.ode.state.oh.us/reportcard> (reporting financial data). Understandably, none of the surrounding districts is interested in absorbing this cost.

Consequently, for all practical purposes, the "choice" offered by the Cleveland voucher program is between the Cleveland Public Schools or one of a limited number of sectarian private schools. Moreover, the real choice lies with the private schools themselves, not the students. The private schools effectively limit the number and type of students whom they are willing to accept. *See supra*, part II.B.

Finally, to the extent the Cleveland program does offer any choice, it largely misses its target population. The Cleveland program is ostensibly aimed at poor students in the Cleveland

Public Schools. *See* Ohio Rev. Code Ann. § 3313.978(A) (West Supp. 2001) ("criteria shall give preference to students from low-income families"). However, the program contains no cap on income eligibility, and students from families with household incomes ranging from $50,000 to $90,000 have received vouchers. *See* Jim Petro, *Cleveland Scholarship and Tutoring Program Special Audit Report* (January 5, 1999). Nor does the program contain a blanket admission priority or preference for low-income students. Instead, it merely requires voucher schools to extend an admission priority for twenty percent of available seats. *See* Ohio Rev. Code Ann. § 3313.978(A).

Consequently, almost twenty-five percent of the costs of the Cleveland program in its first year went toward tuition for students who were *already enrolled* in private schools rather than for the disadvantaged public school students for whom DPIA funds are intended. American Federation of Teachers, *The Cleveland Voucher Program: Who Chooses? Who Gets Chosen? Who Pays?* iii (1997). A more recent study found that one in three students participating in the voucher program was already enrolled in a private school before receiving a voucher. *See* Zach Schiller, *Cleveland School Vouchers: Where the Students Come From* (2001). For these students, the voucher program did not create any choice that was not already available to them.[7]

A similar situation occurred in Milwaukee after the addition of religious schools to the program in the 1998-99 school year, when the voucher program experienced its largest ever enrollment growth. That year, forty-six percent of the new voucher students were already enrolled in a Milwaukee private school before receiving a voucher. On the other hand, just twenty-nine

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[7] Problems in program administration likely compounded these trends. The state audit of the Cleveland program revealed that the selection process permitted students from high-income families to be selected for the program before the low-income students who were supposed to receive preference. The same report found that the lack of record-keeping by voucher schools could permit the award of vouchers to students who did not qualify at all under the program. *See* Jim Petro, *Cleveland Scholarship and Tutoring Program Special Audit Report*, (January 5, 1999).

percent of new voucher students that year were public school transfers. *See* Wisconsin Department of Public Instruction, *Milwaukee Parental Choice Program Facts and Figures for 1998-99, Breakdown of Choice Enrollment by Where Enrolled in Prior School Year.* Even some voucher school administrators have acknowledged this wrinkle. "The make-up of our student body has stayed the same. Many of our current choice kids were our students before choice." Public Policy Forum, *School Choice In Its Tenth Year* 5 (April 5, 2000).

In short, to the extent the Cleveland program offers any new choice to any students, it is the choice of a parochial education that is made available to a handful of well-behaved, non-disabled students who are acceptable to the parochial schools. This is hardly the panacea that would warrant foresaking the values behind public education or stretching an analysis under the Establishment Clause.

B. Vouchers Do Not Help Their Recipients.

Overall, researchers paid by the state in both Ohio and Wisconsin have "found little or no difference in voucher and public school students' performance." GAO Report at 4; *see also* John F. Witte, *The Milwaukee Voucher Experiment: The Good, the Bad, and the Ugly,* Phi Delta Kappan, September 1999, at 62. One of the most striking findings in these official evaluations, however, was the discovery by Kim Metcalf that voucher students enrolled in schools established in response to the Cleveland program actually scored lower in all five subject areas than their public school peers. *See* Kim Metcalf, *A Comparative Evaluation of the Cleveland Scholarship and Tutoring Grant Program* (1998); *see also* GAO Report at 27-28.

A handful of other researchers (Jay P. Greene, William G. Howell and Paul E. Peterson) examining the Cleveland and Milwaukee programs found isolated gains among voucher students in specific subject areas. The GAO, however, concluded that all of these studies suffered from significant limitations and did not include their findings in its recent report to Congress. *See* GAO Report at 28, 30 and 33. In contrast, Metcalf's most recent review

of the Cleveland program found that students in public schools actually showed greater gains in core areas than students in voucher schools. *See* Kim Metcalf, *Cleveland Scholarship Program Evaluation, 1998-2000* (Sept. 2001). Meanwhile, there have been no reviews of the academic performance of Florida's voucher students, and the state refuses to publicly release their test scores. *See* Associated Press, *State Refuses to Release School Voucher Test Scores* (June 8, 2000).

C. Vouchers Do Not Help the Public Schools.

Unable to establish that vouchers help their recipients, voucher advocates assert that voucher programs enhance the public schools as a whole by providing competition. This argument is equally unsupported.

The notion that voucher programs actually improve public school districts defies common sense. The Cleveland voucher program diverts millions of dollars from the Cleveland school system while leaving behind tens of thousands of students, including those with the greatest needs. The Milwaukee program does the same, but also diverts funds from more than two hundred other public school districts in the state. And there is no evidence that either Cleveland's or Milwaukee's schools have improved as a result.

The only alleged "evidence" cited to support the "improvement through competition" argument comes from Florida. Beginning in the 1999-2000 school year, Florida made vouchers available to students in school districts that had received failing grades on state assessments during two of the previous four years. During the 1999-2000 school year, the program affected 900 students from two schools, although only fifty-eight utilized a voucher to attend a private school. *See* GAO Report at 39. No new students qualified for vouchers in 2000-2001 because, at the start of that school year, no school in the state had received an "F" rating for two of the preceding four years. *See* GAO Report at 38.

Voucher advocates point to the absence of failing schools in 2000-2001 as proof that the voucher program served as an incentive to the public schools to improve. *See, e.g.*, Jay P. Greene, *An Evaluation of the Florida A-Plus Accountability and School Choice Program* (2001). However, the conclusions of Greene (one of the Cleveland and Milwaukee program researchers whose findings were questioned in the GAO Report), have been sharply criticized by other researchers. *See, e.g.*, Michael A Fletcher, *Milwaukee Will Vouch for Vouchers*, Washington Post, March 20, 2001, at A1; Jessica L. Sandham, *Study Finds 'Voucher Effect' in Florida Test Gains,* Education Week, February 21, 2001, at 12, 15; *Debating Florida's Voucher Effect*, Education Week, March 14, 2001, at 48; *A Flunking Effect?*, Education Week, March 14, 2001, at 48; *Choice Words,* Education Week, March 21, 2001, at 21; Jessica L. Sandham, *Second Study Questions Research Linking Voucher Threat to Gains*, Education Week, March 28, 2001, at 22.

Greene's critics note that he did not consider the impact of state assistance that provided extra teachers and additional resources for struggling schools, nor attempt to isolate the effect of the stigma of being labeled a "failing school." *See* Fletcher, *supra*; Sandham, *Study Finds Voucher Effect*, *supra*. They also note that the lowest-performing public schools in other states that grade or label their schools in a manner similar to Florida but that do *not* offer vouchers have also improved. *See Debating Florida's Voucher Effect*, *supra*. Others have criticized the methodological structure of Greene's study. *See A Flunking Effect?*, *supra*; *Choice Words*, *supra*. Another researcher has theorized that the "F" schools simply followed a strategy of focusing heavily on raising the scores on the state's writing test, deemed by many to be the easiest of Florida's three state tests in which to make sizable gains. *See* Sandham, *Second Study Questions Research*, *supra*.

Further, the Institute for Policy Research at Northwestern University conducted a comprehensive review of the available research and data on "school competition" and found no consistent effect on student achievement. *See* Christopher Jepsen, *The Effects of Private School Competition on Student Achievement* (Nov. 2000)

<http://www.northwestern.edu/IPR/publications/papers/jepsenwp99.pdf>. In short, there is no evidence, from Florida or elsewhere, that voucher programs improve public schooling for anyone.

IV. The Cleveland Voucher Program Violates the Establishment Clause.

While vouchers are flawed in many ways, the greatest problem with the Cleveland program is its violation of the Establishment Clause. In determining whether a government program of educational assistance violates the Establishment Clause, the Court considers whether the program "'result[s] in governmental indoctrination; define[s] its recipients by reference to religion; or create[s] an excessive entanglement.'" *Mitchell v. Helms*, 530 U.S. 793, 808 (2000) (quoting *Agostini v. Felton*, 521 U.S. 203, 234 (1997)).

In the context of government aid to religious schools, the indoctrination analysis asks "whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action." *Mitchell*, 530 U.S. at 809 (citing *Agostini*, 521 U.S. at 226). The answer depends, in part, on whether the government aid program is truly neutral, and on whether government aid reaches the religious school only as the result of private choices. *See id.* at 809-810.

Mitchell and *Agostini* also require the Court to examine "whether an aid program 'defines its recipients by reference to religion.'" *Mitchell*, 530 U.S. at 813 (quoting *Agostini*, 521 U.S. at 234). While this inquiry overlaps with the examination of neutrality, it seeks "to answer a somewhat different question—whether the criteria for allocating the aid 'create a financial incentive to undertake religious indoctrination.'" *Id.* (quoting *Agostini*, 521 U.S. at 231). All of these factors indicate that the Cleveland program violates the Establishment Clause.

A. The Cleveland Program is Not Neutral.

The structure of the Cleveland voucher program directly benefits religiously-affiliated private schools. Aid under the Cleveland program flows only to those private schools that agree to limit their tuition to $2500 per year. Overwhelmingly—ninety percent in the 1999-2000 school year—the participating schools are sectarian. These schools enroll ninety-six percent of voucher recipients under the Cleveland program. *See* GAO Report at 25.

This is no accident. Sectarian private schools traditionally have lower tuitions than secular private schools, in large part because sectarian schools are subsidized by their churches. *Id.* The General Accounting Office specifically concluded that the structure of the Cleveland program "appears to have limited the program primarily to low-tuition religious schools." Secular schools, on the other hand, have explained that "they could afford to accommodate just a few voucher students because they must find corporate or other sponsors to subsidize the difference" between the voucher amount and their usual tuition. *Id. See also supra*, Part III.A; *Simmons-Harris v. Zelman*, 234 F.3d 945, 959 (6th Cir. 2000) ("Practically speaking, the tuition restrictions mandated by the statute limit the ability of non-sectarian schools to participate in the program. . . ."), *cert. granted*, 70 U.S.L.W. 3232 (2001).

The Ohio legislature could have crafted a more neutral program. The legislature could have raised the voucher amount, eliminated the tuition cap, or permitted voucher students to use their $2500 toward tuition at *any* school, but it did not. Although it may be seeking to promote quality education, Ohio cannot claim that it "offers aid on the same terms, without regard to religion, to all who adequately further that purpose." *Mitchell*, 530 U.S. at 810. Instead, Ohio created a non-neutral program that directly favors sectarian institutions.

Thus, the Cleveland program differs from other government-aid programs previously upheld by the Court. *Compare Mitchell*, 530 U.S. 793 (Chapter 2 federal funding available equally to all schools, public and private); *Agostini*, 521

U.S. 203 (Title I federal assistance available equally to all private schools); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (IDEA assistance available to all students regardless of school attended); *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986) (state assistance available to all students based on disability regardless of school attended); *Mueller v. Allen*, 463 U.S. 388 (1983) (tax credit available to all families for all educational expenses, regardless of school attended). This lack of neutrality in the Cleveland program is sufficient in itself to establish a violation of the Establishment Clause.

B. The Cleveland Program Does Not Involve "Genuinely Independent Private Choice."

The religious indoctrination that occurs in Cleveland's sectarian schools can also reasonably be attributed to governmental action because no genuinely independent private choice separates the government aid from the sectarian schools. *See Mitchell*, 530 U.S. at 810; *Witters*, 474 U.S. at 488. In the Cleveland program, only one real private choice is involved: the initial choice to participate in the program. Once a family makes that choice, the flow of aid directly to a sectarian institution is virtually assured because of the program's structural preference for religiously-affiliated private schools.

The funding mechanism in the Cleveland program appears to have been created to give the illusion of private choice. However, while voucher checks are nominally made out to the family of the voucher students, the families never acquire any control of the checks. *Compare Mitchell*, 530 U.S. at 841 (O'Connor, J., concurring) (noting that aid was provided directly to individual students). Checks are sent to the participating schools and deposited by the participating schools. Any refund is paid back to the state, not the family. The family cannot spend a cent at any institution other than the participating school (which, for more than nineteen students out of twenty, will be sectarian). The only contact between the family and the money is a visit to the school office to endorse the check over to the school. *See* GAO Report at 5-6; *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 836 (N.D.

Ohio 1999), *aff'd*, 234 F.3d 945 (2000), *cert. granted*, 70 U.S.L.W. 3232 (2001). For all practical purposes, the program is one of direct aid to the private schools in a per-capita amount for each voucher student.

Thus, the Cleveland program leaves no room for "independent decisions made by numerous individuals to guide their secular aid" to a particular school. *Mitchell*, 530 U.S. at 843 (O'Connor, J., concurring). The aid does not "pass[] through the hands, (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere." *Id.* at 816. Nor do voucher checks bear any relationship to "a public servant contributing her government paycheck to the church." *See Rosenberger v. Rector and Visitors*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring) (citing *Witters*, 474 U.S. at 487). Rather, the voucher checks are functionally checks to the sectarian institutions. Again, this element of the Cleveland program distinguishes it from other types of government aid to sectarian schools that the Court has previously approved. *Compare, e.g., Zobrest*, 509 U.S. 1 (IDEA assistance follows student to *any* school the student chooses to attend), *and Witters*, 474 U.S. 481 (same as to state vocational aid). In *Witters*, for example, the vast majority of state aid went to secular schools. *See Witters*, 474 U.S. at 487.

C. The Cleveland Program Directly Funds Sectarian Instruction.

The Court has "long been concerned that secular government aid not be diverted to the advancement of religion." *Mitchell*, 530 U.S. at 840 (O'Connor, J., concurring) (citing also *Bowen v. Kendrick*, 487 U.S. 589 (1988) for proposition that "actual diversion is constitutionally impermissible"). Thus, "[t]o establish a First Amendment violation, plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes." *Id.* at 857 (O'Connor, J., concurring); *see also Rosenberger*, 515 U.S. at 847 (1995) (O'Connor, J., concurring) ("[Prior] decisions, however, provide no precedent for the use of public funds to finance religious activities.).

The Cleveland program unquestionably provides for the direct funding of religious instruction. The Cleveland vouchers cover all tuition at the participating schools; that is, they pay for all portions of the instructional program. The instructional programs at the religious schools include religious instruction as a central component. *See Simmons-Harris v. Zelman*, 72 F. Supp. 2d at 837-838 (discussing religious emphasis of parochial private schools in the Cleveland program).

The Cleveland program thus differs substantially from many of the programs of state aid to religious institutions that have come before the Court. Instead, the Cleveland program closely resembles the grant program rejected by the Court in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). Just as in *Nyquist*, "[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid." *Nyquist*, 413 U.S. at 780.

While the Court's jurisprudence under the Establishment Clause has evolved since *Nyquist*, the Court has never upheld a program that directly funds religious instruction. In *Mitchell*, the federal aid program prohibited aid for religious purposes and contained safeguards against religious use. *Mitchell*, 530 U.S. at 831-832. In *Agostini*, the aid program provided "supplemental, remedial instruction to disadvantaged children on a neutral basis" and was "carefully constrained." *Agostini*, 521 U.S. at 234. In *Witters*, the Court observed that "aid to a religious institution unrestricted in its potential uses" would violate the Establishment Clause if attributable to the State, although the Court found no violation "[o]n the facts present here." *Witters*, 474 U.S. at 489. And in *Zobrest*, the Court found the presence of a state-financed interpreter on a parochial school campus acceptable in part because "no funds traceable to the government ever find their way into sectarian schools' coffers." *Zobrest*, 509 U.S. at 10.

The Court has previously drawn a line between the mandates of the Free Exercise and Establishment Clauses by

prohibiting direct government aid for sectarian instruction. The Court should not blur that line, which prevents both the reality and the appearance of government endorsement of religion. *See Mitchell*, 530 U.S. at 842-43 (O'Connor, J., concurring) (discussing impact of direct aid on endorsement).

D. The Cleveland Program Creates an Incentive for Religious Instruction.

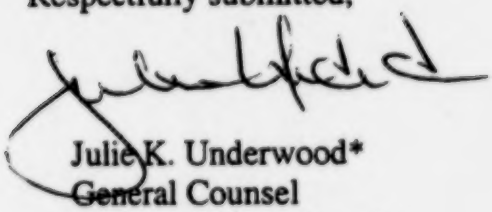
The last substantial question in the Establishment Clause analysis under *Mitchell* and *Agostini* is "whether the criteria for allocating the aid 'create a financial incentive to undertake religious indoctrination.'" *Mitchell*, 530 U.S. at 813 (quoting *Agostini*, 521 U.S. at 231). The Cleveland program creates a clear incentive for religious instruction.

A central mission of most of the sectarian schools in the Cleveland program is religious instruction. *Simmons-Harris*, 72 F. Supp. 2d at 837. The entire design of the Cleveland program creates a financial incentive for students to attend participating private schools, which are overwhelmingly sectarian. Put simply, for those students who want out of the Cleveland Public Schools, the state will pay them to attend a participating sectarian school, but will not pay them to attend a non-sectarian school that does not participate in the program. Thus, despite the Ohio legislature's attempt to create a facially neutral program, the reality in Cleveland is that vouchers create both a financial incentive and a direct subsidy for religious instruction. *See, e.g.*, *Mitchell*, 530 U.S. at 845-46 (O'Connor, J., concurring) (discussing danger that financial incentive will have the effect of advancing religion when aid is not neutral).

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit should be affirmed.

Respectfully submitted,



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